

UNITED STATES DISTRICT COURT

ORIGINAL

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	Pretrial Conference
)	
Plaintiff,)	
)	
vs.)	NO. C 20-05640 YGR
)	
APPLE, INC.,)	Pages 1 - 41
)	
Defendant.)	Oakland, California
)	Friday, March 26, 2021

REPORTER'S TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

APPEARANCES (VIA ZOOM) :

For Plaintiff: Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019
BY: GARY A. BORNSTEIN,
KATHERINE B. FORREST, ATTORNEYS AT LAW

For Defendant: Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, California 90071
BY: RICHARD J. DOREN, ATTORNEY AT LAW

(Appearances continued next page)

Reported By: Raynee H. Mercado, CSR No. 8258

Proceedings reported by electronic/mechanical stenography;
transcript produced by computer-aided transcription.

A P P E A R A N C E S (CONT'D.)

For Defendant: Gibson Dunn & Crutcher LLP
2001 Ross Avenue, Suite 1100
Dallas, Texas 75201
BY: VERONICA S. MOYÉ, ATTORNEY AT LAW

--○○○--

1 Friday, March 26, 2021

9:21 a.m.

2 P R O C E E D I N G S

3 (Zoom Webinar)

4 **THE CLERK:** Calling civil action 20-5640, Epic Games,
5 Inc. versus Apple Inc.

6 And, counsel, please state your appearances.

7 **MS. FORREST:** Good morning, Your Honor. This is
8 Katherine Forrest for plaintiff Epic Games, Inc.

9 **MR. BORNSTEIN:** And good morning. Gary Bornstein
10 also for Epic Games.

11 **MR. DOREN:** Good morning, Your Honor. Richard Doren
12 for Apple.

13 **MS. MOYÉ:** Good morning, Your Honor. Veronica Moyé
14 for Apple.

15 **THE COURT:** Okay. Good morning, everyone.

16 As you know, I sent you a note asking whether we needed
17 this conference. It sounds like we did. You sent me the
18 things that you want to talk about. So we'll go through
19 those. I've got something else I'd like to mention as well.

20 Just so that you know, none of you are actually in the
21 Bay Area, but the Bay Area is doing really well with COVID.
22 We track those numbers every week.

23 We are now having one criminal trial in each of our
24 courthouses. And we hope if -- if the rates continue as we
25 expect, then a majority of all Bay Area counties will be in

1 the minimal tier, which is our yellow. I don't know what kind
2 of classifications you use in your homes, but out here that is
3 the -- that is the least restrictive tier.

4 We should all -- we should have a majority of our counties
5 in that tier by April 27th, and perhaps all of them by
6 May 4th. So we are really pleased with how people are doing
7 in terms of health and safety.

8 We just received notice yesterday that the vaccine is
9 being opened for all people over 50 April 1st and for
10 everybody over 16 by April 15th. So we are -- people are
11 getting vaccinated around here. It's -- I think we're at a
12 point where things -- you know, we're trying to have as many
13 courtrooms open as possible.

14 So long and short, my -- I'm still prepared to proceed in
15 person. That's the plan. Our colleagues and I, we're -- we
16 have a method to our madness. And I do have a courtroom for
17 this trial. So assuming again that everything continues to
18 progress as we think it will.

19 Any questions on that front?

20 **MS. FORREST:** No questions, Your Honor.

21 Actually just one perhaps related question to how I think
22 we're all preparing for the in-person trial and have been
23 assuming such.

24 There is a -- some ambiguity in terms of when -- what the
25 quarantine requirements are for people who are coming in from

1 out of state, if they have been vaccinated, and whether or not
2 they have to be in place and in state ten days in advance
3 or -- of their appearance or not.

4 If Your Honor receives any information in that regard,
5 that would assist us in determining whether there's a ten-day
6 advance quarantine period, from other experience you may have.
7 We would appreciate hearing about that. Otherwise we will
8 monitor the CDC and State of California guidelines.

9 **THE COURT:** Okay. I will -- I'll ask our assistant
10 clerk of court who is doing all of this monitoring for us and
11 see if he has any better information.

12 **MS. FORREST:** Thank you.

13 **MR. DOREN:** And Your Honor, obviously that's great
14 news for many, many reasons. And one of our agenda items was
15 the number of people who could be in the courtroom for trial.
16 And perhaps that's an issue that's better addressed as we get
17 closer to the day and can -- can, you know, size the
18 situation.

19 But in our meet and confer process, I think that both
20 sides would -- would prefer to have their own hot seat
21 operator in the room. And the number that the parties had in
22 mind, if it would be acceptable to the Court by May 3, would
23 be for each side to be able to have up to eight people in the
24 courtroom.

25 **THE COURT:** And who are the -- how are you

1 calculating that eight?

2 **MR. DOREN:** That would be the hot seat operator, Your
3 Honor, the two lead counsel, and then in addition, some
4 support, for example, a paralegal who we would plan to have in
5 attendance, and then a corporate representative from each
6 party would be in the courtroom and then likely an associate
7 or two who would be helping with whichever witness is on the
8 stand.

9 **THE COURT:** Let me see. That's a little high because
10 I need to have in there individuals as well.

11 And you can plan on six.

12 **MR. DOREN:** Thank you, Your Honor.

13 **THE COURT:** If I can get you more than that, I will
14 try. But you can plan on six.

15 **MS. FORREST:** Thank you, Your Honor.

16 And can we assume that among the six would be the hot seat
17 operator?

18 **THE COURT:** I don't care who you have as your six.
19 You get six --

20 **MS. FORREST:** Perfect.

21 **THE COURT:** -- people as far as I'm concerned.

22 **MS. FORREST:** All right. Thank you.

23 **THE COURT:** And it doesn't -- you know, it doesn't
24 have to be the same for each side so you all can decide.

25 **MR. DOREN:** Thank you, Your Honor.

1 **MS. FORREST:** A related point had to do with the
2 masks in the courtroom and how Your Honor would like to handle
3 that in terms of both those present in the courtroom, the
4 examining attorney, and the witness. And we stand ready to
5 comply with whatever Your Honor would like in that regard. We
6 just wanted to understand.

7 **THE COURT:** Yeah.

8 So we don't -- you know, we don't ask whether people have
9 the vaccine or not. I'll let you know I do. I don't mind
10 telling people. So I'm fully vaccinated at this point. I'm
11 in the courtroom now.

12 But I don't know whether people have opted to get the
13 vaccine or not. So I think it still is useful for people to
14 wear masks in the courtroom, and you should plan on wearing
15 masks. We expect it in the courthouse. I don't think we're
16 going to change that rule.

17 I did -- we do have in -- and if you want to use a
18 different kind or found a different kind, that's fine. I got
19 this from -- from our court staff. So these are the masks
20 that we are using in trials. They go over the nose and the
21 mouth so you can see the eyes. I think there are a couple
22 ways to put them on.

23 But in any event, these are the masks that we'll have the
24 witnesses use so that we can actually see expressions, or at
25 least I can see expressions. That would be my preference. So

1 we'll provide these unless you have something similar that you
2 want to provide yourself.

3 If somebody wants on their own to wear a see-through
4 shield on top of this for their own safety, I don't have any
5 objection to them doing that. But this would be the -- this
6 would be the plan for the witnesses. And this is what we're
7 using in our other trials.

8 **MR. DOREN:** I've used those masks in a trial last
9 December, Your Honor. And they -- they work reasonably well.

10 **THE COURT:** So can you then tell me, Mr. Doren, does
11 this go behind the neck? Because --

12 **MR. DOREN:** I --

13 **THE COURT:** Because otherwise it seems to me when I
14 put it on, I tried it out, if it hangs here, then -- then the
15 sides don't fold in.

16 **MR. DOREN:** Yeah.

17 **THE COURT:** If you don't put it behind your neck --
18 or when you put it behind your neck, then it -- then it shapes
19 to the face and that gives more closure.

20 **MR. DOREN:** Yep.

21 **THE COURT:** That being said, this little thing pops
22 up. So it seems to me that once it's fitted, someone should
23 tape it down or something so that it doesn't like scratch you
24 in the eye.

25 **MR. DOREN:** It is quite a piece of engineering, there

1 is no doubt about it.

2 **MS. FORREST:** A related point, Your Honor, which may
3 be helpful is if people are wearing masks, would Your Honor
4 allow us to have walk-around mics that would clip on to the
5 lapel and actually boost the sound. Because we can arrange
6 for that, and it might be of help.

7 **THE COURT:** Absolutely. So I will put in my next
8 order, because we do have some -- although, you know, we
9 really should test this. I have in my order pre-COVID for
10 those attorneys during trial who cannot, for the life of them,
11 stay at the podium, I require them to have a lapel mic and --
12 and have the -- the language that -- or the -- technical
13 requirements that work for our courtrooms.

14 How that works with Zoom, I don't know. I don't know that
15 we've tested that. So we'll probably have to test it. And I
16 don't know if your IT people can arrive earlier to test
17 whatever -- you know, whatever system you actually have, but I
18 think that that would be helpful. And then it -- you know, to
19 the extent you have -- you each have them, it helps in terms
20 of folks moving around.

21 **MS. FORREST:** Yeah, we can -- Your Honor, we're going
22 to actually be in the area before -- before the trial begins
23 in a sufficient time to, if we can, make arrangements with
24 your chambers to come over at a convenient time to test all of
25 the equipment, including those mics. And so we'll arrange

1 that with your chambers.

2 **MR. DOREN:** And the parties will coordinate on doing
3 that once together.

4 **THE COURT:** Okay.

5 **MR. DOREN:** And Your Honor, one other thing that I
6 think both parties were wondering is whether there may be a
7 viewing room for the public other than the courtroom, kind of
8 what would have been an overflow room had it been a full courtroom.

9 **THE COURT:** No.

10 **MR. DOREN:** Okay. Very good.

11 **THE COURT:** There's not. And here's the reason --
12 here's the reason why. In the Oakland courthouse, we have six
13 courtrooms. We have -- we are supposed to have trials going
14 on, that is, jury trials. So we have six courtrooms, two
15 courtrooms on three floors. So the two lower floors have --
16 will have jury trials happening. I believe that, you know, we
17 are all backed up. One courtroom is being used for
18 proceedings. The second courtroom is being used for jury
19 deliberation to give the jurors sufficient distance and space.

20 That gives us a court, you know, an active courtroom on
21 the second floor, an active courtroom on the third floor, and
22 then on the fourth floor which is where I expect we will be,
23 we have our hybrid courtroom that all the judges share for
24 criminal proceedings that will continue to take place.

25 And then this -- and then the last courtroom, the last

1 courtroom to open would be the one that we're in that would be
2 for any other kind of proceedings, something like this. So
3 there just is no other space.

4 **MR. DOREN:** Sure. Sure. And would that go as well
5 for conference rooms where witnesses could wait and that sort
6 of thing, or would there be a space for that?

7 **THE COURT:** So I asked about that, and this is
8 what -- what we can offer. Because we are not using our jury
9 rooms, we can offer the jury room that is close to the
10 courtroom where we'll be. So you can have the next witness
11 up, whoever that is, in that room with let's say one person,
12 maybe two, but we don't want a lot of people in there.

13 Down the hall -- so that -- that room we'll make available
14 to you. But we don't want, you know -- it will be for the
15 next witness up is what we'll say, the next witness to
16 testify.

17 There is an attorney lounge down the hall. We have one in
18 the building that is available to attorneys. It is open. It
19 will -- there will be signs about social distancing. It is
20 not monitored. And attorneys are asked to monitor it, you
21 know, to do self-monitoring with respect to these issues.

22 There are two conference rooms in that attorney lounge
23 which can be reserved on a first-come, first-served basis. As
24 I said, there will be criminal trials that will have started
25 before you so I don't know if they're available or not

1 available. But those conference rooms will be -- you know,
2 are available to attorneys in trial on a first-come,
3 first-served basis.

4 Now, I did have a trial a few years ago where the lawyers
5 rented some office space literally across the street in an
6 attorney's office. So they had their war room set up across
7 the street from the courthouse. That may be an option that
8 you want to think about.

9 **MR. DOREN:** Thank you.

10 **MS. FORREST:** All right.

11 Your Honor, the next item on our agenda concerns a topic
12 that --

13 **THE COURT:** You know what, let me --

14 **MS. FORREST:** Pardon me.

15 **THE COURT:** Let me interrupt, Ms. Forrest.

16 I haven't received any requests from news media on -- on
17 access. I think all news media knows that we are restricted
18 under the Administrative Office of the Courts' requirements
19 that we cannot have live streaming of witness testimony, of
20 evidentiary hearings, and so access is only going to be, at
21 this point, by -- by the, you know, by conference line. So
22 they'll get -- they'll get it orally.

23 But I've -- I'm not -- I don't know if you all have
24 received requests. I haven't received any requests.

25 So, okay. Go ahead.

1 **MS. FORREST:** The next issue, Your Honor, has to do
2 with the handling of what has been marked during the discovery
3 process as confidential and highly confidential information.

4 The parties have met and conferred about this and are, I
5 believe, in agreement that we are aligned on our desire to
6 have an open proceeding that will not have a lot of sort of
7 choreography around handling such information. And as a
8 result, both parties are motivated to dedesignate vast
9 quantities of information that has heretofore been considered
10 confidential or highly confidential.

11 For instance, it would be our expectation that the
12 findings of fact and the intended trial exhibits would be
13 largely -- maybe not completely because there's some
14 third-party issues that are with partners that might have to
15 be handled or some particular financial information -- but
16 that the vast bulk of information would be available to be
17 utilized in the open courtroom, talked about, and that would
18 then allow Your Honor to put together a decision which has as
19 few redactions or no redactions as possible for what we
20 believe is going to be a very important decision, and we want
21 the rationale of that decision to be as open as possible to
22 the readers.

23 **THE COURT:** So you should know, Ms. Forrest, that --
24 or all of you, in the Northern District, we rarely redact. So
25 the presumption is that it is open. And I have a standard

1 footnote that I put in my orders that say to the extent it's
2 in this order, your request to seal is denied.

3 I have read plenty of orders where I can't tell what is
4 happening on topics that are important and are novel. And I
5 don't like it and I don't do it.

6 So I write my orders -- in fact, I think the only thing
7 that I've ever sealed were national security issues. I don't
8 think I've ever sealed anything else.

9 So the presumption in my courtroom is that it is open.
10 And you need to ask if I am sealing. And if there is a
11 dispute about it, then I can resolve that.

12 But the fact that anybody designated something as
13 confidential or highly confidential before, there is no
14 presumption when we go to trial. The presumption is that it
15 is not sealed. Not the other way around.

16 **MS. FORREST:** And, Your Honor, I think the parties
17 are going to attempt to actually facilitate that by having our
18 findings of fact and intended trial exhibits, as much as
19 possible, pre-dedesigned. And so those will go into the --
20 and be available to the public early on so we won't have a lot
21 of choreography.

22 We just wanted to tell Your Honor that. We understand
23 that we're just simply complying with the presumptions that
24 are already in place.

25 **THE COURT:** No, I appreciate it, but you should also

know what my perspective is.

MS. FORREST: Rich, would you like me to sort of launch into deposition designations?

(Simultaneous colloquy.)

MR. DOREN: Depositions, sure, that's great.

MS. FORREST: Okay. And then for the exciting --

THE COURT: And then, again, Ms. Forrest, we use last names, not first names.

MS. FORREST: I'm sorry. I'm sorry, Your Honor.

THE COURT: Go ahead.

MS. FORREST: Yeah. Sometimes we slip into it having spent so much time together recently. But of course, Your Honor, I understand.

The exciting topic of deposition designations, we wanted to make sure that we are able to provide to you what you need and want and comply with pretrial order number 2 in terms of the designations.

And there really are just two issues. We understand that you would like to have the run time be the way in which the clock is utilized for both the four hours and then counting against the parties' clock. I think everybody understands that.

What we were wondering -- and this is coming from Epic, I don't know actually if Apple takes a position on this or not -- is whether we are able to utilize the company that

would normally cut the depositions for purposes of being played at trial and to use that run time. Because there are things, for instance, where a witness may spend some appropriate time looking at a document, but it can be a long time on the transcript between the question and the answer. That would often get cut out if the videographer is preparing it for trial so that it would be a little bit more seamless.

So our request to Your Honor would be that we prepare the excerpts in the same manner as we would if they were to be played at trial and to use that run time. The parties can confer on that to make sure that we're aligned on that. We would use run time, but we would use run time that's done in perhaps a more sophisticated manner than heretofore.

THE COURT: That's fine.

MS. FORREST: The second piece I think is just really a logistics. There'll be a number of documents that are going to come in with a sponsoring witness through a deposition designation. And we just wanted to ask Your Honor if it would be appropriate if at the beginning of trial, we could provide Your Honor with a list of such documents and have those be received if they do have appropriate sponsoring witnesses.

And of course, that assumes any objections will have been dealt with by the judicial officer that the parties will hire to resolve any such objections pursuant to Your Honor's order.

MR. DOREN: And, Your Honor, I'm -- I'm -- I've never

1 been quite clear on how this would work. We have discussed it
2 a time or two. I know that Your Honor has said that you will
3 take some designations before trial begins. And certainly to
4 the extent documents come in through those designations, it
5 would seem appropriate that they be included with the
6 designations and come into the record at that time.

7 I would think that other documents would come into
8 evidence at the time that other designations are used.

9 **THE COURT:** So I'm not sure I'm following what your
10 question or your concern is. Let me -- let me tell you what I
11 do.

12 Parties -- I always try to make things as efficient as
13 possible. If you are all stipulating to the admission of
14 exhibits, that's fine. You can give me a list, I can put a
15 stamp on it, and they're admitted.

16 What I do is I track all your exhibits, and I make a note
17 as to whether or not I've admitted them or not. If there's a
18 stipulation and Exhibit 52 is being discussed, I look at my
19 list, it's admitted, we move on.

20 If it's not admitted because there's some dispute, then
21 I -- you have to lay the foundation, which takes time. You
22 lay the foundation, I hear the objection, I rule on the
23 objection, I tell you whether or not it comes in. So as an
24 accommodation to all of you, I'm agreeing to read some things
25 in advance.

1 If there is deposition testimony that references a
2 document and you don't give me the document, I don't know
3 how -- what you expect me to do with that testimony. I need
4 to see the document.

5 If you've all agreed it's coming in, then it's -- it's
6 going to come in, and we'll do the mechanics of the order
7 later.

8 So I'm not sure I understand your question, Mr. Doren.

9 **MR. DOREN:** Oh, no, I agree. With the procedure Your
10 Honor just laid out, I'm in agreement with and completely
11 comfortable with. And -- and to proceed in that way makes
12 perfect sense.

13 I guess my point was exactly I agree the parties should
14 meet and confer about which documents and exhibits they can
15 stipulate to the admission of, and -- and that will save us
16 all -- all a lot of time. And -- and that of course is a meet
17 and confer once we have our exhibits in front of us. And I --
18 and I agree that's how we should proceed.

19 **THE COURT:** And the other thing is, again, just --
20 you know, if you stipulated -- lots of times lawyers want to
21 stipulate that lots of things come in, but they never talk
22 about it in trial. I don't allow that. Whether it's me or
23 the -- or a jury, what I'm not going to have you do is
24 stipulate to the admission of 50 documents which we never talk
25 about, I never discuss in an order because I don't understand

1 the context or what it is you're trying to do in terms of that
2 document, whether it's -- you know, if it's in deposition,
3 then I've read the deposition so that's -- that's part of the
4 trial.

5 But you actually have to explain its relevance.
6 Otherwise, you know, the Court of Appeal, you'll make some
7 argument at the Court of Appeal, which I'm assuming whoever
8 loses will go to under all circumstances, and then you can
9 argue that it was in the record.

10 Well, it might have been in the record, but if we didn't
11 talk about it, I don't know what I'm supposed to do with it.
12 So stipulate all you want. I'll look at my list. It comes in
13 when we talk about it. No foundation is necessary.

14 **MS. FORREST:** Thank you, Your Honor. I think that
15 helps a lot with the logistics.

16 **MR. DOREN:** And I guess the -- the next agenda topic
17 are questions regarding written directs. And specifically,
18 Your Honor, for -- as a threshold matter, I just wanted to
19 confirm whether, in light of the Court's order about the
20 parties having 45 hours to do with what they will, whether the
21 Court would still receive written directs from expert
22 witnesses or whether you wanted that testimony live?

23 **THE COURT:** I was expecting to get written directs.
24 What I'm trying to do is cabin some of what it is you all are
25 trying to do. So some of -- so one side, for instance,

1 suggested that I read much more than the other side. That's
2 why I gave you a time limit. That's why I put limits on the
3 deposition transcript pages that I need to read.

4 And like I said in the order, if you want -- you know, if
5 you want more than the presumptive, then it counts against
6 your time. I'm trying to keep the playing field even between
7 both sides.

8 I don't have your expert reports. So I didn't have a
9 sense of how to manage or cabin the written directs. So I can
10 say 25 pages, ten pages, single-spaced. I'm, you know -- if
11 you have a proposal, I'm willing to listen to it, but I didn't
12 exactly -- because I don't have your reports, I didn't exactly
13 know how to -- how to manage that piece.

14 **MR. BORNSTEIN:** Your Honor, if I may, we, the
15 parties, have discussed the issue and tried to come up with a
16 proposal that we all can live with, obviously subject to the
17 Court's approval, that we thought would try to implement the
18 idea of giving each side the opportunity to have equivalent
19 time, so to speak, in terms of written time with the Court and
20 then to use whatever in-court time we have as -- as we see fit
21 pursuant to Your Honor's order.

22 So what we had discussed and agreed on in concept as
23 between the parties would be that there would be an aggregate
24 number of words. You know, rather than dealing with
25 formatting and pages, we borrowed the Ninth Circuit word limit

1 style that the parties could choose to use across their
2 experts so it wouldn't be, you know, ten pages for Expert A,
3 ten pages for Expert B, and so forth. There would just be an
4 aggregate number. Because some experts cover much more ground
5 than others do. And a one-size-fits-all page limit we all
6 thought would be constraining for some of our experts.

7 So our thought was to come up with a word limit that was
8 acceptable to the Court that the parties could then use their
9 discretion to allocate across their -- their experts.

10 **THE COURT:** And that includes, I take it, I'm not
11 going to get exhibits attached? Or what am I -- you know,
12 that is, reports that you want me to read or written direct
13 that you want me to read without attachments.

14 **MR. BORNSTEIN:** That was the concept, Your Honor.
15 Any attachments or -- or exhibits would -- would come in
16 through -- through a different process in the ordinary way.

17 **THE COURT:** You know, that's fine. I still think in
18 terms of pages. I don't think in terms of words. You have to
19 use 12 -- 12-point font because I -- if it's anything less, I
20 have to get my glasses, and I don't always want to get my
21 glasses. So I have a very discriminate -- I can't read it so
22 I know that it's not 12-point.

23 And I don't -- you know, if we did pages, then it seems to
24 me I don't care how you allocate your pages just like I don't
25 care how you allocate your hours. But I think what does --

1 Apple has four experts and Epic has three?

2 **MR. DOREN:** Your Honor, Apple has four economists.
3 And then there are also some security experts. So Apple
4 actually has seven. And I believe including rebuttal
5 experts -- and Mr. Bornstein can correct me if I'm
6 incorrect -- Epic has eight.

7 **THE COURT:** Okay. So knowing that, how many pages do
8 you think across all the experts that -- how many pages are
9 you looking at?

10 **MR. BORNSTEIN:** Well, what we had discussed in terms
11 of words, Your Honor, which is how we had talked about it --
12 and obviously we can translate that to pages -- is we had
13 discussed a hundred thousand words.

14 **THE COURT:** So I need -- so do your math.

15 **MR. BORNSTEIN:** So to translate --

16 **THE COURT:** How many words on a page, approximately?

17 **MR. BORNSTEIN:** My -- my understanding is, I think
18 about it myself in terms of appellate briefs, and that would
19 be seven appellate briefs, which I think translates -- a
20 typical appellate brief is somewhere in the neighborhood of
21 30, 35 pages. So I think that would translate, let's call it
22 50 words a page, to about 200 pages as across seven or eight
23 experts. But someone should check me if I have that math
24 wrong because I was not thinking about it in pages myself.

25 **MR. DOREN:** I actually think that's probably off by

1 about 50 percent. I think it's close to 300 pages.

2 **MS. FORREST:** I suppose that depends on whether you
3 single-space or double-space.

4 **THE COURT:** Well, that's why I'm asking you. Because
5 the Ninth Circuit uses 14 page -- 14-point font which I find
6 to be difficult to read too because it's too big. You don't
7 get enough words on a page.

8 **MR. BORNSTEIN:** So I'm -- I'm told, Your Honor, that
9 it's apparently approximately 250 words per page if you are
10 double-spaced. So that would translate as actually to a
11 larger number even than Mr. Doren had spelled out, if my math
12 is correct. It takes us to 400 if we were to use the -- the
13 number that the parties had -- had been talking about.

14 **THE COURT:** So a hundred thousand words.

15 Okay. That's fine. Here's what I want you to do, though.
16 Using, you know, the standard Word format and standard Word
17 margins, single-spaced, 12-point font, spaces in between your
18 paragraphs, and a table of contents.

19 I also want up front a summary of the actual opinions, and
20 I want them numbered. So executive summary up front, and then
21 the explanation as to each of those opinions in terms of a
22 written direct can follow.

23 But I should be able to tell -- actually if you do it that
24 way, I don't need a table of contents. Just put in
25 parentheses if it's opinion one. If there are ten opinions,

1 opinion one, you know, see pages 2 to 7 after the opinion.

2 But I should be able to tell within the first two pages what
3 the opinions of all of these individuals are.

4 **MR. BORNSTEIN:** And if we're -- if we're doing this
5 single-spaced, Your Honor, then I guess we cut that number
6 that I had given in half, the math would be about 500 words
7 per page --

8 **THE COURT:** Right.

9 **MR. BORNSTEIN:** -- single-spaced. So that gets us
10 down to 200 pages, I believe, per side.

11 **MR. DOREN:** A mere 200 single-spaced pages.

12 **THE COURT:** Well, I'm reading Bork's book on
13 antitrust, and that's at 437.

14 **MR. DOREN:** And, Your Honor, there have been some
15 discussion between the parties about the use of written
16 directs.

17 **THE COURT:** Hold on. I want that written direct by
18 April 27th.

19 **MR. DOREN:** And, Your Honor, do you want those from
20 both parties on the same day, or may Apple, as the defendant,
21 have a few days in which to consider what is in the directs of
22 the Epic witnesses?

23 **THE COURT:** Well, aren't you going to know that?
24 Haven't you taken their depositions?

25 **MR. DOREN:** We will certainly have the discovery,

1 Your Honor. Dr. Evans, for example, has a 500-page expert
2 report, and he will then be deposed for I think we're up to
3 14 hours. So which of those opinions will actually be
4 expressed at trial, we will -- we will only learn when we see
5 his direct.

6 **MR. BORNSTEIN:** Your Honor, if I can be heard on
7 that. We -- we do think it would be very important to have
8 these go in simultaneously. If Mr. Doren's concern is that he
9 will need an opportunity to respond, I think there are few --
10 few issues there. Number 1, as you say, there's been
11 extensive discovery including a 14-hour deposition --

12 **THE COURT:** Mr. Bornstein. Mr. Bornstein.

13 **MR. BORNSTEIN:** Yes.

14 **THE COURT:** My response on all this is going to be
15 how would we do it at trial. Right? That's the point. We're
16 trying to cut the number of hours in the courtroom down.

17 So if it is a rebuttal examination, that would always come
18 in after the fact. I don't know how many rebuttal folks you
19 all have and how many affirmative opinions you have. So let
20 me get my list, and you tell me.

21 All right. So I'm looking at Epic's list. Docket --
22 docket 376 at page 12. Susan Athey, Ned Barnes, Michael
23 Cragg, David Evans, Wenke Lee, Nancy Mathiowetz, James
24 Mickens, Peter Rossi.

25 Are any -- are all of these affirmative experts or are any

1 of these rebuttals?

2 **MR. BORNSTEIN:** So of those people, Your Honor, six
3 of them put in opening reports, two of them put in only a
4 rebuttal report.

5 **THE COURT:** Okay. Which --

6 **MR. BORNSTEIN:** And two of them put in both.

7 **THE COURT:** Which are those?

8 **MR. BORNSTEIN:** Which are the ones who put in both?
9 That's Dr. Evans.

10 **THE COURT:** Which are the ones who are your
11 rebuttals?

12 **MR. BORNSTEIN:** The ones who are purely rebuttal were
13 Dr. Cragg and Professor Mathiowetz.

14 **THE COURT:** And who put in both?

15 **MR. BORNSTEIN:** That would be Dr. Evans and Professor
16 Lee.

17 **THE COURT:** All right. Apple. I'm looking again at
18 docket 375, page 15 of 17.

19 Which of these are rebuttals as opposed to affirmative?

20 **MR. DOREN:** Your Honor, each of the seven experts put
21 in both initial reports and rebuttal reports, which were
22 obviously submitted after seeing Epic's reports. And each of
23 those experts will be replying, at least in part, to what Epic
24 puts in in their affirmative case.

25 **THE COURT:** All right. Go ahead, Mr. Bornstein.

1 **MR. BORNSTEIN:** Thank you, Your Honor.

2 The principle of having this match up with trial makes
3 sense to me in the following respect. We're going to have
4 these witnesses come. They will all testify live. They will
5 have the opportunity to review, for example, our economists'
6 written direct much before they ordinarily would have the
7 opportunity to review or hear the direct of a live trial
8 witness before their responsive witness takes the stand.

9 So take Dr. Evans, for example, who will be someone who
10 will supply an opening written -- written direct as well as
11 testify live. Professor Schmalensee, one of their experts who
12 addresses Dr. Evans' testimony, not only will he have, you
13 know, the one day or so that he would ordinarily have at trial
14 given the pairing of experts, he will have at least a week to
15 review the written direct of Dr. Evans before Apple's
16 economist, Professor Schmalensee, takes the stand.

17 So we think that even if we have the written directs go in
18 simultaneously, there will be ample opportunity for rebuttal
19 witnesses, both ours and theirs, to consider the testimony to
20 which they are responding before they take the stand.

21 And if we do have these go in in a sequential way, as Your
22 Honor can see from the number of experts and the number that
23 do either rebuttal and/or an opening report, we're going to
24 have to have a series of staggered deadlines so that there can
25 be an exchange over time which I think will take us to a -- to

1 a time period that could very well be well before trial, which
2 would have the effect of compressing the time the parties have
3 to prepare these written directs and to make them as good as
4 they can be for the Court.

5 **MR. DOREN:** Your Honor, if I may?

6 **THE COURT:** You may.

7 **MR. DOREN:** In our last hearing, counsel for Epic
8 proposed April 20th as a day to submit written directs. And
9 so a reasonable schedule would be for the Epic written directs
10 to go in on April 20th and for the Apple written directs to go
11 in on April 27. And the -- what that would accomplish is,
12 with the Court having given each side a hundred thousand words
13 to put in the opinions of each of these experts in their
14 direct, part of our experts' direct will be in responding to
15 the directs of their experts.

16 So to have a written direct in front of this Court
17 sufficiently in advance of trial where the Court can evaluate
18 how the experts engage on each other's opinions before they
19 take the stand and cross-examination begins, this is really
20 the only effective means to accomplish that.

21 **THE COURT:** What's the prejudice, Mr. Bornstein?

22 **MR. BORNSTEIN:** Well, the prejudice, Your Honor, is
23 twofold. Number 1, it's compresses the time that we have to
24 prepare the written directs. And second, we have opening
25 reports from both sides where if -- if we're going to do a

1 staggered approach like this, I would think we would need to
2 have both sides submit an opening and then a rebuttal, and
3 then we'll have a rebuttal to what their -- to what their
4 folks have had to say. For example, Dr. Cragg and Professor
5 Mathiowetz, who are our rebuttal experts only in -- only in
6 rebuttal would need the opportunity to respond to what the --
7 the Apple witnesses to whom they respond have said.

8 So if, for example, we don't get any Apple reports until
9 April 27, well, Dr. Evans, Professor Lee, Professor Mathiowetz
10 and Dr. Cragg have nothing -- nothing to respond to until they
11 see those -- those reports, which would mean we have to have
12 yet another deadline sometime after that and presumably before
13 trial for us to put in our reports that respond to the reports
14 that Apple has generated. And when I say reports, I mean the
15 written directs.

16 **MR. DOREN:** Obviously, Your Honor, those are
17 qualitatively different situations, one being where the Apple
18 experts are coming in as defense experts to deal with what has
19 gone on in the affirmative case presented by Epic, and the
20 other being what Epic does or doesn't elect to do after Apple
21 has completed presenting its case in terms of presenting
22 expert rebuttal testimony.

23 And if there need be a date for expert rebuttal testimony
24 from Epic, that may, depending on how the Court wishes to
25 approach the issue, involve a second date. But certainly

1 Apple needs, in preparing its case for trial, to be able to
2 respond in its written directs to the opinions that are put
3 forward by Epic in its affirmative case.

4 **THE COURT:** All right.

5 This is what I'm going to do: Epic, by April 20th, will
6 serve their written direct on Apple. Apple will serve their
7 written direct by April 23rd. Simultaneous filings with the
8 court by April 27th.

9 **MR. BORNSTEIN:** And how would Your Honor propose that
10 we handle the -- the rebuttal experts that we have?

11 **THE COURT:** You've got between the 23rd and the 27th
12 to get it done.

13 **MR. BORNSTEIN:** Okay.

14 **THE COURT:** So I don't need to see your first cuts.
15 They're really there so that you can -- you each can see what
16 the other side is doing. All I want to see is the final
17 product on the 27th.

18 Okay.

19 **MR. BORNSTEIN:** All right. Thank you, Your Honor.
20 That's clear.

21 **THE COURT:** The next topic on your list was expert --
22 expert testimony as to facts subject to connection. I did not
23 understand.

24 **MR. BORNSTEIN:** I can take a first shot at this, Your
25 Honor.

1 The -- the issue here is Your Honor had made some
2 observations the last time we were all together about the
3 importance of having the expert witnesses testify only based
4 on facts that are in the record or otherwise subject to
5 judicial notice for one reason or another, which the parties
6 all fully understand.

7 The question we had is whether Your Honor will allow the
8 witnesses, either in the written direct or live, to testify to
9 facts that have not yet come in the record because a
10 particular witness, for example, hasn't had the opportunity to
11 take the stand, but that the parties expect will come in the
12 record before the trial is concluded, recognizing that if some
13 particular fact does not come into the record, the -- the
14 opinion that is based on that fact would either be lacking one
15 of its supporting pillars or perhaps be stricken entirely if
16 none of those pillars are there.

17 So it's really just a question of sequencing as to whether
18 Your Honor wants the full factual basis to come in before the
19 witness actually takes the stand or whether the witness can
20 testify as to his or her opinions subject to the facts coming
21 in through a subsequent witness.

22 **THE COURT:** Yeah, I think -- I don't see that there's
23 any way around it given that I've agreed to read in advance,
24 so....

25 **MR. BORNSTEIN:** Very good. Thank you --

1 **THE COURT:** One thing with respect to that, though,
2 that I am going to modify from my pretrial order number 1, I
3 was talking to one of my colleagues here, Judge Jeff White,
4 who recommended to me that rather than have you all redline
5 those proposed findings of fact within a week, he said he
6 recently did a bench trial like -- not exactly like this, but
7 he required it daily. And I think that that's a great idea.

8 So he said what you'll do is, you know, the attorneys will
9 designate one person, and they'll get those things done daily.
10 And that way we know what's come in and what hasn't come in.
11 And if there are any -- if there are any disputes, we deal
12 with them immediately rather than later.

13 So as you know, you're going to be filing proposed
14 findings of fact and conclusions of law and on a daily basis.
15 So the next day, the day after trial, you file a redlined
16 version which shows what's actually been proved as opposed to
17 what is proposed in terms of findings of fact. Conclusions of
18 law are a little bit different.

19 **MR. BORNSTEIN:** So I expect the way Your Honor is
20 envisioning this, in the first few days of trial would be an
21 awful lot of strikeout for things that haven't yet come in.
22 Is that the way that you are envisioning this would happen?
23 Because we clearly wouldn't have gotten to the full set of our
24 findings of fact after only the -- you know, the first few
25 days of trial. So this would be an evolving document where in

1 the beginning there'd be a lot of things --

2 **THE COURT:** It's not a strikeout as much as it is the
3 redline. So it says, you know, in 2007 the iPhone was -- you
4 know, hit the market. That's a proposed finding of fact.
5 After the day one or perhaps it's -- you know, after day one,
6 it would say at the end of that sentence, "day one of trial,
7 testimony Tim Cook."

8 So it's not that you're striking everything. It's that
9 you're adding the record cites showing that you've proved it.

10 **MR. BORNSTEIN:** I see. That's very helpful. Thank
11 you.

12 **THE COURT:** And then what we can do at the end in
13 light of what you just said is that I am sure that if there is
14 an opinion by an expert that was based on a fact that was
15 never proved, the opposing side is going to let me know that.
16 Right? I'm sure you won't let that slide.

17 Okay.

18 **MR. DOREN:** Your Honor, one other comment or question
19 on the -- the order of expert witnesses.

20 Your Honor has expressed a preference for back-to-back
21 experts. As Mr. Bornstein referenced, Professor Evans will be
22 providing a number of opinions to which we will be offering a
23 number of experts in response. In other words, multiple
24 experts in response to the one.

25 And that puts us collectively in a position where after

1 Dr. Evans takes the stand, then several Apple witnesses would
2 take the stand. And we wanted to ask the Court, in light of
3 that, since it may not have been clear that we had -- that
4 that would be the sequencing of experts, whether back to back
5 is still the Court's preference, or if Apple could present
6 those experts after its fact witnesses testify in its -- in
7 its case. Obviously whatever the Court's preference.

8 **THE COURT:** You know, the -- the one that I'm -- I
9 don't -- your brief statements of the summary of their
10 testimony is pretty brief, which is fine. It's hard to give
11 you an informed opinion. What my -- my main concern is the
12 economic experts. Those are the ones that I would really
13 prefer to have back to back.

14 **MR. DOREN:** And so --

15 **THE COURT:** On issues like security and stuff like
16 that, I don't -- it's less of an issue. But the economic
17 experts I'd like to have back to back.

18 **MR. DOREN:** So where -- where that likely has us, and
19 I'm just stating it so we're all on the same page -- is the --
20 the Epic economist or economists will testify, and then Apple
21 currently has potentially four economists who would -- who
22 would testify then immediately thereafter so the Court
23 would -- would have them all as a unit basically.

24 **THE COURT:** I just -- I think it will help me, you
25 know, grasp those concepts. And frankly, look, I ask

1 questions in a bench trial. And so I'll be able to ask
2 questions while everything is still fresh. So --

3 **MR. DOREN:** Thank you.

4 **THE COURT:** -- I don't tend to do it in jury trials
5 but this isn't a jury trial.

6 **MR. DOREN:** Thank you, Your Honor.

7 **MR. BORNSTEIN:** And to that end, Your Honor, to round
8 it out, as we discussed, we do have our rebuttal experts. I
9 presume -- I shouldn't presume. Would Your Honor prefer to
10 have those come at the end so that those rebuttal experts can
11 take account not only of the expert testimony, but also the
12 facts that may be presented in Apple's case, rather than have
13 them come, you know, immediately after the Apple experts? And
14 then we really -- we don't get kind of a full opportunity to
15 do rebuttal based on everything.

16 So I think it would be our preference to have them come at
17 the end, but I want to be sure we're responsive to what would
18 be most helpful to the Court.

19 **THE COURT:** Look, I'm going to let you try your case
20 the way you're going to try your case. I've told you what I
21 think will be helpful. If you think it will be more helpful
22 for me to have all those facts before they come back in, then
23 that's fine.

24 In terms of the economic theory, I want them back to back.
25 If there's something else going on here, then, you know, then

1 you can -- then you can wait. I'll leave it to you.

2 **MR. BORNSTEIN:** Okay. Thank you, Your Honor. We'll
3 give that consideration.

4 **THE COURT:** Okay.

5 **MR. DOREN:** And then, Your Honor, the last item, at
6 least that -- that Apple has on its list, is simply the
7 question of liability and remedies and whether obviously Apple
8 does not expect there to be a remedy resulting from these
9 proceedings since that -- it believes there will be no
10 liability. But having said that, we just want to know the
11 Court's expectations in this regard.

12 We --

13 **THE COURT:** My expectation is that everything comes
14 in. We are not bifurcating. I want to understand the
15 totality of the liability and remedies issues.

16 I am -- I have pushed everything aside so that I can fully
17 engage in this case. I've moved my criminal calendars until
18 after this trial. And two weeks after this trial, I go into a
19 jury trial. So my -- what I want is I want it all there now.

20 **MR. DOREN:** Very well. Thank you.

21 **THE COURT:** Other questions?

22 **MS. MOYÉ:** Your Honor, could I just circle back on
23 written expert directs for one moment.

24 You've been very generous in giving us a large word count.
25 I just want to be sure about the Court's expectation about the

1 scope of oral direct expert testimony in light of the written
2 direct.

3 Is it the Court's expectation that all of the direct --

4 **THE COURT:** I have no expectation, Ms. Moyé. I've
5 given you 45 hours. You use it the way you want.

6 **MS. MOYÉ:** Okay.

7 **MR. DOREN:** Your Honor, let me reframe the question.

8 In terms of the written directs, do you expect them to be
9 comprehensive statements of the opinions to be offered by each
10 expert?

11 **MS. MOYÉ:** That's the question.

12 **THE COURT:** I will read what you give me within these
13 limits, and if you want to give me half, then I'll read half.
14 If you give my the whole thing, then I expect I'll get the
15 whole thing. I -- you know, if for some reason you think you
16 don't want it in writing and it needs to be oral, okay, fine.
17 There -- there isn't -- I guess there isn't an expectation. I
18 will take it orally, I will take it in writing.

19 **MR. DOREN:** That's helpful.

20 **MS. MOYÉ:** Understood, Your Honor. We just wanted to
21 be clear. Thank you.

22 **THE COURT:** All right. I think writing is easier.
23 It certainly helps for an order. But --

24 **MS. MOYÉ:** Yes, Your Honor, that's why --

25 (Simultaneous colloquy.)

1 **MS. MOYÉ:** Yeah, that's why we raised the issue
2 because the Court had previously explained how it intended to
3 use the written directs. So --

4 **THE COURT:** Ms. Moyé, you should invest in a \$30 mic.

5 **MS. MOYÉ:** I actually have a mic here. I'm so sorry,
6 Your Honor, that it's creating difficulty. I will get a
7 better one.

8 **THE COURT:** We're going into trial next week on Zoom,
9 and one of the lawyers has this old-fashioned retro mic that
10 looks like a radio mic. He said it cost him \$35 on Amazon,
11 and we can hear him great. So....

12 **MS. MOYÉ:** I will check with that counsel, Your
13 Honor.

14 **THE COURT:** Okay.

15 Other questions?

16 **MS. FORREST:** I don't think we had anything further
17 on our list, Your Honor.

18 **MR. DOREN:** That is our agenda, Your Honor.

19 **THE COURT:** Do we have any -- any update in terms of
20 how many individuals we think are going to be testifying
21 remotely or asking to testify remotely?

22 **MS. FORREST:** Your Honor, we have, we think
23 potentially and we're not yet sure, two. And we are trying to
24 assess whether or not that's in fact going to occur or not.

25 But the bulk -- the vast majority of witnesses should be

1 testifying in person, Your Honor, for the Epic side.

2 **MR. DOREN:** And, Your Honor, for Apple, I'm aware of
3 one witness currently who may seek leave to testify remotely.
4 But, again, the majority will be live.

5 **THE COURT:** Okay. That's helpful to know because
6 we'll still have to outfit the courtroom to -- to allow for
7 that remote appearance.

8 **MR. BORNSTEIN:** Your Honor, it does occur to me there
9 is one other item that I thought would be helpful to raise
10 which is that we -- under the Court's rules, we have due to
11 the Court today our compliance statement. And I --

12 **THE COURT:** You're all complying?

13 **MR. BORNSTEIN:** I can attest on behalf of Epic, we
14 are -- we are complying. And I -- I would ask that you excuse
15 us of the opportunity to -- to file that piece of paper if we
16 can make an oral representation to the Court right now.

17 **MR. DOREN:** I will join Mr. Bornstein's
18 representation and request.

19 **THE COURT:** All right. That's noted.

20 And, Ms. Stone, you can take them off the compliance
21 calendar.

22 **MR. BORNSTEIN:** Thank you, Your Honor.

23 **THE COURT:** Okay. I think -- and you've made
24 arrangements -- if not, just don't forget to make arrangements
25 for the court reporter. I'm assuming you're going to want

1 realtime and daily transcripts.

2 **MR. BORNSTEIN:** Yes, Your Honor.

3 **THE COURT:** And then do I have you on my calendar
4 again? Or are we done?

5 **MR. BORNSTEIN:** We do have a final pretrial
6 conference set in April.

7 **MS. FORREST:** I think it's the 21st of April.

8 **MR. BORNSTEIN:** That's right.

9 **THE COURT:** Okay. Do you want to leave it on
10 calendar, I take it?

11 **MS. FORREST:** I think it would be helpful, Your
12 Honor, just in case there are additional issues. But we can
13 confer in advance, and if there's nothing else for us to
14 raise, we can inform the Court and Your Honor can make a
15 determination as to whether we should proceed or not.

16 **MR. DOREN:** Agreed.

17 **THE COURT:** Okay. If you do want to proceed, again
18 it's helpful for me when you send me your agenda in advance.
19 I was able to, on some of these things, because you sent it in
20 advance, talk to our court staff which is why I got that mask
21 and other things. So it gives me a little bit of a head start
22 so I can actually be responsive as opposed to just taking down
23 your questions.

24 Okay?

25 **MR. BORNSTEIN:** Thank you, Your Honor.

1 **MR. DOREN:** Thank you, Your Honor.

2 **MS. FORREST:** All right. Thank you.

3 **THE COURT:** If there's nothing else, then we're
4 adjourned. Stay safe, and we'll see you on the platform soon.
5 Thank you.

6 **MR. DOREN:** Thank you, Your Honor.

7 **MS. FORREST:** Thanks.

8 (Proceedings were concluded at 10:23 A.M.)

9 --oo--

10

11 **CERTIFICATE OF REPORTER**

12

13

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled matter.
16 I further certify that I am neither counsel for, related to,
17 nor employed by any of the parties to the action in which this
18 hearing was taken, and further that I am not financially nor
19 otherwise interested in the outcome of the action.

20

21 

22 Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

23 Friday, March 26, 2021